Supreme Court, U.S.
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No. 05-1630

IN THE

Supreme Court of the United States

ALBERTO R. GONZALES, ATTORNEY GENERAL,
Petitioner,

v.

NOPRING PAULINO PENULIAR,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the court of appeals correctly apply *Taylor v. United States* to conclude that California Vehicle Code Section 10851(a) (Unlawful Taking of a Vehicle), which includes as principal offenders aiders and abettors and accessories after the fact, is not categorically a "theft offense" under the United States Immigration and Nationality Act?

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Nopring Paulino Penuliar respectfully submits this opposition to the Attorney General's petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

STATEMENT OF THE CASE

In his Petition ("Pet."), the Attorney General asks this Court to grant certiorari in the separate case of *Gonzalez v. Duenas-Alvarez*, No. 05-1629, and to hold this case pending resolution of *Duenas-Alvarez*. Pet. at 8-9.[1] The petition for certiorari should be denied.

First, there is no conflict among the circuit courts on the question presented by Petitioner. The cases allegedly creating a conflict in "analytically indistinguishable circumstances," Pet. (*Duenas-Alvarez*) at 11, involve neither the Immigration and Nationality Act ("INA") nor criminal "theft offenses," let alone criminal statutes remotely similar to the California vehicle theft statute at issue here. *Id.* at 11-14. But even if cases involving matters such as the federal sentencing guidelines could create a legitimate conflict with the application of the INA in this case, the Ninth Circuit recently granted *en banc* review to address a sentencing guidelines decision that reaches the same result as the circuit decisions that the Attorney General contends are in conflict with this case. *United States v. Vidal*, 426 F.3d 1011 (9th Cir. 2005), *vacated by grant of reh'g en banc*, 453 F.3d 1114 (9th Cir. 2006). Thus, even if the Petition were correct in alleging a circuit conflict – and it is not – at most, there would be an

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[1] The Attorney General's Petition for a Writ of Certiorari in *Gonzales v. Duenas-Alvarez*, filed with this Court on June 22, 2006, is cited herein as "Pet. (*Duenas-Alvarez*)." Because the Attorney General provided no substantive argument for a grant of certiorari in this case, instead asking for this case to be held in light of his petition in *Duenas-Alvarez*, citations to the arguments raised by the Petitioner are made to the Petition in *Duenas-Alvarez*.

intra-circuit conflict that should be, and is being, addressed in the first instance by the *en banc* court of appeals. *See Davis v. United States*, 417 U.S. 333, 340 (1974) (Harlan, J.) ("decisions between different panels of the same Court of Appeals will not be considered to present a reviewable conflict, since such differences of view are deemed an intramural matter to be resolved by the Court of Appeals itself").

Nor is there a pressing need to resolve the issue presented in this case. As noted, there is no conflict among the courts of appeals. Further, as the government admits, both the Senate and the House of Representatives have passed legislation that would address the question presented in the petition by expanding the INA's definition of "aggravated felony" to include, inter alia, "aiding [and] abetting . . . an offense" that qualifies as an "aggravated felony." Pet. (*Duenas-Alvarez*) at 21-22 (internal quotation omitted). As such, a ruling by this Court interpreting the scope and meaning of the INA might have limited, if any, continuing significance in light of this pending legislation.

Even were the issue presented in the petition urgent, however, this case is not an appropriate vehicle for resolving that issue. This case involves a California statute that uniquely includes as principals traditional accessories after the fact. Pet. App. 30a. Because this statute includes accessories after the fact, this Court could affirm the decision of the court of appeals based on the broad scope of the statute without ever reaching the "aiding and abetting" issue identified by Petitioner. Further, the Attorney General himself argues that there is a threshold jurisdictional question that potentially could prevent the Court from resolving this case on the merits. Pet. 8-9. The Petition does not suggest that this threshold question is independently worthy of this Court's review. *Id.* Indeed, the threshold question of exhaustion identified by the Petition involves a fact-intensive review of the record that the Attorney General contends calls

into question the jurisdiction of the court of appeals. In short, this is not a proper vehicle to resolve the question presented.

Nor should this case be held pending the resolution of *Duenas-Alvarez*, because certiorari should be denied in that case, as well. In addition to the reasons set forth above, review of the court of appeals' decision in *Duenas-Alvarez* would be inappropriate because that case was remanded back to the Board of Immigration Appeals ("BIA") to apply the second prong of the two-part approach set forth by this Court's settled precedent. The interlocutory nature of that decision is itself a basis for denying review. *E.g.*, *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). That is particularly so where there is no conflict among the courts of appeals, there is, at most, an intra-circuit conflict for which rehearing *en banc* has been granted, and there is pending legislation passed by both houses of Congress that, if enacted, could render any ruling meaningless in future cases. *Id.*; *see also, e.g.*, *American Constr. Co. v. Jacksonville, Tampa & Key W. Ry.*, 148 U.S. 372, 384 (1893); Robert L. Stern et al., *Supreme Court Practice* § 4.18, at 260 (8th ed. 2002).

Finally, certiorari should be denied because there is no allegation that the decision below conflicts with any decision of this Court. To the contrary, the court of appeals' decision was substantively correct, as it faithfully applied the approach set forth in this Court's cases to the specific language and structure of Section 10851(a) of the California Vehicle Code.

A. Factual Background

Nopring Paulino Penuliar is a native and citizen of the Philippines who legally immigrated to the United States on June 12, 1995, when he was 15 years old. Form EOIR-4, (filed July 17, 2002) (A.R. 67-74). Mr. Penuliar has extensive family ties in the United States. His daughter Marilyn, a United States citizen, was born on March 16, 1998 to Mr. Penuliar's domestic partner, Glenda Alejo, also a

United States citizen. *Id.* (A.R. 70). Additionally, Mr. Penuliar's mother Prudencia is a United States citizen. *Id.* Mr. Penuliar also has four siblings, Gelacio, Virgilio, Dora, and John, who are all lawful permanent residents of the United States. *Id.* (A.R. 70, 74).

As is relevant here, on June 30, 2000, Mr. Penuliar pled guilty in the State of California to the Unlawful Taking of a Vehicle under California Vehicle Code Section 10851(a) ("Unlawful Taking of a Vehicle"). Pet. App. 42a-44a. He was sentenced on December 13, 2000 to two years imprisonment for this offense. *Id.* Also on December 13, 2000, Mr. Penuliar pled guilty in the State of California to a second charge of the Unlawful Taking of a Vehicle, as well as a charge of Evading an Officer under California Vehicle Code Section 2800.2(a) ("Evading an Officer"). *Id.* at 48a-52a. He was sentenced to three years imprisonment for each charge, to be served concurrently. *Id.*

B. Statutory Background

Aggravated Felonies Under the INA. Under the INA, several classes of immigrants legally present in the United States are nonetheless subject to removal. 8 U.S.C. § 1227(a). They include individuals who have been convicted of an "aggravated felony." 8 U.S.C. § 1227(a)(2)(A)(iii). The INA defines aggravated felony to include a long list of various types of offenses, including "a theft offense" and "a crime of violence." 8 U.S.C. § 1101(a)(43)(F) & (G). The INA expressly provides that an aggravated felony includes "an attempt or conspiracy to commit an offense described in this paragraph," but nowhere states that the definition includes aiding and abetting the commission of such an offense. 8 U.S.C. § 1101(a)(43)(U).[2]

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[2] Both the House and Senate have passed bills that would amend the INA to add language expanding the definition of "aggravated felony" to include "soliciting, aiding, abetting, counseling, commanding, inducing, procuring or an attempt or conspiracy to commit an offense described in

To decide whether a particular offense constitutes an aggravated felony under one of the categories listed in the INA, the courts of appeals use a two-step approach. This system was promulgated by this Court in *Taylor v. United States* with regard to the list of offenses included in the Armed Career Criminal Act. 495 U.S. 575, 599-602 (1990) (interpreting 18 U.S.C. § 924(e)); *see, e.g., Soliman v. Gonzales*, 419 F.3d 276, 284 (4th Cir. 2005); *Huerta-Guevara v. Ashcroft*, 321 F.3d 883, 886-88 (9th Cir. 2003). Under *Taylor*, a reviewing court first assumes a "categorical" approach, comparing the statute at issue to the "generic" definition of the category of offense in the INA. The generic definition is determined by reference to state law, and should "correspond[] to the definition[] of [the category of offense] in a majority of the States' criminal codes." 495 U.S. at 589.

If all conduct covered by the statute at issue is also covered by the generic definition, then a conviction under that statute is categorically a conviction for an aggravated felony under the INA. If, however, the statute also covers conduct outside the generic definition, then courts assume a "modified categorical" approach, wherein they review the record to determine whether the conviction of the individual in question still falls within the generic definition.

California's Unlawful Taking of a Vehicle Statute. Under California law, a person violates Section 10851 of the Vehicle Code if he "drives or takes a vehicle not his or her own, without the consent of the owner thereof, and with intent either to permanently or temporarily deprive the owner

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this paragraph." Border Protection, Antiterrorism, and Illegal Immigrant Control Act of 2005, H.R. 4437, 109th Cong., § 201(a)(3) (passed Dec. 16, 2005); *see also* Comprehensive Immigration Reform Act of 2006, S. 2611, 109th Cong., § 203(a)(5) (passed May 25, 2006) (amending § 1101(a)(43(U) to define "aggravated felony" to include "aiding or abetting an offense described in this paragraph, or soliciting, counseling, procuring, commanding, or inducing another, attempting, or conspiring to commit such an offense").

thereof of his or her title to or possession of the vehicle." Cal. Veh. Code § 10851(a). A person may also be guilty under the statute if he "is a party or an accessory to or an accomplice in the driving or unauthorized taking or stealing." *Id.* California criminal law usually distinguishes between principals and those who assist a principal after the offense is committed. Cal. Penal Code § 31. The presence of the term "accessory" in Section 10851(a) of the Vehicle Code, however, allows an individual to be convicted as a principal even if that person engaged in conduct generally relegated to the separate offense traditionally referred to as accessory after the fact. *See* Cal. Penal Code § 32; *see also* Pet. App. 14a ("§ 10851(a) includes accessory or accomplice liability.").

C. Procedural Background

Initial Removal Proceedings. On April 23, 2002, while Mr. Penuliar was serving his sentence in state prison, the Immigration and Naturalization Service ("INS") served him with a Notice to Appear, which charged that he was removable under Section 237(a)(2)(A)(iii) of the INA because he had been convicted of "an offense relating to obstruction of justice, perjury or subornation of perjury, or the bribery of a witness," an aggravated felony under 8 U.S.C. § 1101(a)(43)(S). Pet. App. 36a. In July 2002, the INS added additional charges of deportability, alleging that Mr. Penuliar had been convicted of "a crime of violence," an aggravated felony under 8 U.S.C. § 1101(a)(43)(F), and "a theft offense," an aggravated felony under 8 U.S.C. § 1101(a)(43)(G). Form I-261, (filed July 11, 2002) (A.R. 102); Form I-862, (filed July 17, 2002) (A.R. 104).

Immigration Judge Dennis R. James (the "IJ") held that Mr. Penuliar's conviction for Evading an Officer was not an obstruction of justice offense, and thus not an aggravated felony under INA Section 101(a)(43)(S). Pet. App. 39a. However, the IJ ruled that Mr. Penuliar's conviction for Evading an Officer was a "crime of violence" under INA Section 101(a)(43)(F), and that Mr. Penuliar's convictions for

Unlawful Taking of a Vehicle were "theft offenses" under INA Section 101(a)(43)(G). *Id.* at 39a-40a. The IJ thus concluded that these convictions were for aggravated felonies, and therefore that Mr. Penuliar was removable as an alien convicted of an aggravated felony. Mr. Penuliar filed a timely appeal with the BIA on November 25, 2002. *Id.* at 62a-64a. In a summary order, the BIA approved the decision of the IJ. *Id.* at 34a.

Court of Appeals Proceedings. The court of appeals reversed, holding that none of the convictions was for an aggravated felony under the INA. Pet. App. 3a. The court held that evading an officer was not categorically a "crime of violence" because the California statute did not contain a *mens rea* element. *Id.* at 7a-10a. As is relevant here, the court of appeals also held that the Unlawful Taking of a Vehicle was not categorically a "theft offense" because the California statute is broadly written to encompass all classes of accessories and accomplices, and thus does not require an individual to exercise control over the vehicle in question. *Id.* at 12a-15a. Likewise, the court concluded that the INS had failed to meet its burden of establishing that Mr. Penuliar's individual convictions were for conduct narrower than that set forth in the broad California statues. *Id.* at 10a-12a, 15a-17a.

The Attorney General petitioned for rehearing and rehearing *en banc* on the issue of whether the Unlawful Taking of a Vehicle was a "theft offense." Petition for Reh'g at 1 (filed Mar. 11, 2005). The Attorney General further argued that Mr. Penuliar had failed to exhaust his administrative remedies before the BIA on this issue. *Id.* at 2. The court of appeals denied the Attorney General's petition. Pet. App. 2a-3a.

On June 29, 2006, the Ninth Circuit granted *en banc* review of a panel decision holding that the Unlawful Taking of a Vehicle under California Vehicle Code Section 10851(a) constitutes a "theft offense" for purposes of increasing a sentence under the federal sentencing guidelines. *United*

States v. Vidal, 426 F.3d 1011 (9th Cir. 2005), *vacated by grant of reh'g en banc*, 453 F.3d 1114, 1115 (9th Cir. 2006).

REASONS FOR DENYING THE PETITION

The petition for certiorari should be denied.

First and foremost, no conflict in authority among the circuit courts exists on the question presented by Petitioner. Sup. Ct. R. 10(a). Indeed, no other circuit court has yet directly addressed whether a violation of Section 10851(a) of the California Vehicle Code should qualify, as a categorical matter, as a "theft offense" for purposes of the INA. The circuit cases cited by the government do not involve removal under the INA, and do not even involve purported "theft offenses," let alone the specific state statute at issue here.

But even if there could be a conflict between this INA case and the various federal sentencing cases identified by the Attorney General, the Ninth Circuit recently granted *en banc* review to address the purported intra-circuit conflict on this issue. As such, there is no need for this Court to review a case that, at most, involves an intra-circuit conflict that is being resolved in the first instance by the Ninth Circuit.

Additionally, legislation passed by both houses of Congress could render the question presented by Petitioner moot in future cases. Given this pending legislation, there is no need for the Court to grant plenary review when Congress itself is considering the same issue advanced by petitioner in an area – immigration – where this Court grants substantial deference to the views of Congress. *See, e.g., Fiallo v. Bell*, 430 U.S. 787, 792 (1977) ("it is important to underscore the limited scope of judicial inquiry into immigration legislation"). Indeed, in light of this pending congressional action, any ruling by this Court might have limited continuing significance. Under these circumstances, there is no need for this Court to expend its resources on review at this time.

Moreover, even should the Court determine that the question presented by Petitioner (whether "aiding and abetting" is included in the definition of "theft offense" for purposes of the INA) is ready for and might warrant review in an appropriate case, this is an improper vehicle to resolve that question. First, the statute at issue in this case not only criminalizes "aiding and abetting," but also extends to include traditional accessories after the fact as principal offenders. The breadth of this statute is well outside the mainstream, and thus is broader than the generic modern definition of "theft offense" even if "theft offense" were deemed to include aiders and abettors generally. Accordingly, this case does not squarely implicate the issue presented by Petitioner.

Nor does the Attorney General dispute that this case is an improper vehicle to resolve this conflict. Specifically, he argues that the court of appeals lacked jurisdiction due to Mr. Penuliar's alleged failure to exhaust his administrative remedies. While Mr. Penuliar disputes any suggestion that he did not exhaust his remedies, Petitioner's stated intent to raise this threshold "jurisdictional" issue also renders this case an inappropriate vehicle for this Court's review. Because Petitioner argues that this issue affects the jurisdiction of the court of appeals, this Court would be required to engage in a fact-intensive inquiry on this antecedent issue before it could even consider the merits of the question presented.

Petitioner's suggestion that this Court hold this petition pending review in *Duenas-Alvarez* is also untenable because *Duenas-Alvarez* is likewise an inappropriate vehicle for review. *Duenas-Alvarez*, another INA "theft offense" case under Section 10851(a) of the California Vehicle Code, suffers from all the flaws rendering this case inappropriate for review (with the exception of the Attorney General's intent to argue failure to exhaust). In addition, *Duenas-Alvarez* is inappropriate for review because the court of appeals' decision in that case is interlocutory. Because the immigration court decision in *Duenas-Alvarez* did not reach

the modified categorical approach, the court of appeals remanded the case to the BIA for further proceedings under the second prong of the *Taylor* analysis. Pet. (*Duenas-Alvarez*) at 6. The interlocutory nature of that petition is therefore sufficient reason for its denial, particularly given the absence of any pressing need to resolve the question presented.

Finally, the decision below was correct. The statute in question, Section 10851(a) of the California Vehicle Code, expressly criminalizes both traditional aiding and abetting and traditional accessory after the fact offenses, which lie outside the modern consensus on the scope of a "theft offense." The statute also incorporates California aiding and abetting law, which likewise includes conduct outside the modern consensus.

I. THIS CASE IMPLICATES NO CONFLICT AMONG THE COURTS OF APPEALS THAT WARRANTS THIS COURT'S REVIEW.

The court of appeals' decision in this case holds that for a conviction to qualify as a theft offense under the INA supporting removal of a lawful permanent resident, the conviction must include a finding that the resident took or exercised control over property not his own. Pet. App. 12a-15a. The court of appeals held that because Section 10851(a) of the California Vehicle Code includes aiding and abetting and accessory (i.e., traditional accessory after the fact) offenders as principals, it does not meet this standard and therefore did not qualify as a "theft offense" under the INA. The court's analysis of Section 10851(a) of the California Vehicle Code did not purport to apply to any of the many other categories of aggravated felonies under the INA, or to any other "aggravated felony" statute. *Id.*

In contrast, not one of the cases cited by Petitioner addresses the requirements for a "theft offense," or even the requirements for deporting a lawful permanent resident under

the INA. Pet. (*Duenas-Alvarez)* at 10-15. Specifically, in *United States v. Mitchell*, the First Circuit ruled that a "crime of violence" under the Bail Reform Act ("BRA") includes aiding and abetting arson. 23 F.3d 1, 2-3 (1st Cir. 1994). In *United States v. Hathaway*, the Second Circuit held that a "violent felony" under the Armed Career Criminal Act (the "ACCA") includes aiding and abetting arson. 949 F.2d 609, 611 (2d Cir. 1991). In *United States v. Groce*, the Seventh Circuit similarly determined that the ACCA's "violent felony" provision included aiding and abetting burglary. 999 F.2d 1189, 1192 (7th Cir. 1993).

Finally, in *United States v. Baca-Valenzuela*, the Eighth Circuit ruled that aiding and abetting the possession of narcotics with the intent to distribute constituted a "drug trafficking crime" warranting an enhancement under the federal Sentencing Guidelines for an offender convicted of the criminal offense of reentry following deportation. 118 F.3d 1223, 1231-33 (8th Cir. 1997). Because none of these cases involves solely the INA or even mentions "theft offenses," there is no conflict among the circuit courts on the issue decided by the court of appeals in this case.

These cases involving the ACCA, the BRA and the Sentencing Guidelines create no conflict with the decision below because these statutes employ different language and serve different purposes than the INA. For instance, the ACCA, at issue in *Hathaway* and *Groce*, provides for enhanced penalties for individuals who have three previous convictions for a "violent felony," defined as "any crime punishable by imprisonment for a term exceeding one year. . . that . . . (ii) is burglary, arson . . . or otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B). The "or otherwise" language in this provision indicates that the examples given – burglary and arson – should be read broadly in the context of risk of physical injury.

Similarly, under the BRA, at issue in *Mitchell*, an individual convicted of a "crime of violence" must generally be held in custody pending sentencing. 18 U.S.C. § 3143(a)(2). The BRA defines a "crime of violence" as including "any other offense that . . . involves a substantial risk that physical force against the person or property of another may be used." 18 U.S.C. § 3156(a)(4)(B). Although this statute does not go so far as to include the examples of arson and burglary, its "any other offense" language, like that of the ACCA, expands the scope of this provision to any offense which might involve the use of force against persons or property. A conviction for aiding and abetting burglary or arson would naturally provide a risk of injury, or the use of force against property. Notably, neither the BRA nor the ACCA require that the offender himself use force or directly injure – they simply require that his actions create the risk of injury, or that there be a risk that force "may be used."

Aiding and abetting arson or burglary thus fit naturally within the confines of "crimes of violence" or "violent felonies." Because the INA's definition of "theft offense" contains none of the attributes which create this fit, the three decisions under these statutes cited by the Attorney General are not in conflict with the Ninth Circuit's determination that a violation of Section 10851(a) of the California Vehicle Code is not a theft offense under the INA because a "theft offense" must involve the actual exercise of control over the property in question.

The Attorney General's argument that the decision below conflicts with the Eighth Circuit's decision in *Baca-Valenzuela* is also demonstrably incorrect. In that case, the Eighth Circuit held that aiding and abetting the possession of narcotics with the intent to distribute constitutes a "drug trafficking crime." 118 F.3d at 1231-33. *Baca-Valenzuela*, however, dealt with sentencing under an "aggravated felony" provision of the federal Sentencing Guidelines. *Id.* at 1231-33.

But, as Petitioner notes, the federal Sentencing Guidelines have been amended specifically to include aiding and abetting offenses within the definition of "aggravated felonies." Pet. (*Duenas-Alvarez*) at 13 n.7. Relying upon this very distinction, the Attorney General himself has recently argued to the Ninth Circuit that *Penuliar* does not conflict with cases under the Sentencing Guidelines. Specifically, the Attorney General has explained that cases under the INA do not conflict with cases under the sentencing guidelines, due to the important differences in their statutory language. Thus, in seeking to avoid rehearing *en banc* in *United States v. Vidal*, 426 F.3d 1011, 1015 (9th Cir. 2005), the Attorney General argued that the decision in this case does not conflict with *Vidal*, a sentencing guidelines case, because this case "was not decided in the criminal context; there is no analogue to [the relevant guidelines Application Note] in [the INA]" that expressly provides that an aggravated felony should include "aiding and abetting." Opp'n. to *Vidal en banc* Pet. at 17 n.10, No. 04-50185 (9th Cir. filed Jan. 23, 2006) (emphasis omitted).

Petitioner cannot have it both ways. He cannot argue to the Ninth Circuit that there is no conflict between *Vidal* and this case because the underlying federal statutes differ in meaningful respects, and then argue to this Court that, even though the circuit decisions that he claims are in conflict with this case involved entirely different federal statutes, those decisions arose in "analytically indistinguishable circumstances." Pet. (*Duenas-Alvarez*) at 11. In any event, the court of appeals' decision to grant *en banc* review in *United States v. Vidal* also renders premature any review of this issue in this case.

In *Vidal*, a panel of the Ninth Circuit held that a violation of Section 10851(a) of the California Vehicle Code constitutes a "theft offense" for purposes of increasing a sentence under the federal Sentencing Guidelines. 426 F.3d at 1013. The petitioner in *Vidal* sought *en banc* review, arguing, *inter alia*,

that the panel's decision conflicted with the Ninth Circuit's decision in *Penuliar*. Reh'g Pet. (*Vidal*) at 4, No. 04-50185 (9th Cir. filed Dec. 6, 2005). The court of appeals granted *en banc* review on June 29, 2006. 453 F.3d 1114, 1115 (9th Cir. 2006). Given that the Ninth Circuit is currently reviewing a decision that is alleged to conflict with the decision in this case, it would be premature to grant review here.[3]

As this Court has explained, certiorari is not appropriate to resolve an intra-circuit conflict. *See Davis v. United States*, 417 U.S. 333, 340 (1974). To the contrary, to the extent that there is any conflict between the Ninth Circuit's decisions in this case and in *Vidal*, such a conflict is best resolved through *en banc* review. *United States ex rel. Robinson v. Johnston*, 316 U.S. 649 (1942); *see also* Stern, *supra* § 4.6, at 235. These principles are especially apt in this case because the Ninth Circuit has granted *en banc* review in *Vidal*. In light of the ongoing proceedings in the court of appeals, it would be premature for the Court to grant review in this case.

II. THE PETITION SHOULD BE DENIED BECAUSE THERE IS NO PRESSING NEED FOR THE COURT TO RESOLVE THE QUESTION PRESENTED.

1. There is no pressing need to resolve the issue presented because, as the Attorney General acknowledges, there currently is legislation pending in Congress which may address this issue in future cases. Pet. (*Duenas-Alvarez*) at 21-22. Both houses of Congress have now passed legislation

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[3] Petitioner may argue that because *Vidal* is a sentencing guidelines case, and the *Vidal* panel's majority opinion drew a distinction on this ground, the grant of *en banc* review in *Vidal* does not render review premature in this case. Again, Petitioner cannot have it both ways. Either sentencing-related cases can conflict with INA cases, or they cannot. If they can, then review in this case is unnecessary due to the ongoing proceedings in *Vidal*. If they cannot, then there is no inter-circuit conflict and certiorari is likewise unnecessary.

defining all classes of aggravated felony to include traditional aiding and abetting offenses. Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005, H.R. 4437, 109th Cong., § 201(a)(3) (passed Dec. 16, 2005); Comprehensive Immigration Reform Act of 2006, S. 2611, 109th Cong., § 203(a)(5) (passed May 25, 2006).[4] It is unclear whether the final text of the provisions would purport to apply retroactively. *Id.* However, should Congress finalize this legislation it may resolve this legal issue for future cases. Given Congress' active consideration of the question presented, there is no need for this Court's intervention to resolve a question that both houses of Congress have addressed through pending legislation.

2. In any event, Petitioner's speculation about the possible effects of the decision below do not provide a reason for granting review. Specifically, Petitioner argues that it will be more difficult to prove that an individual committed an "aggravated felony" under the modified categorical approach than under the categorical approach, and that the court of appeals may apply its decision to different factual and legal circumstances. Pet. (*Duenas-Alvarez*) at 15-22. These arguments should be rejected.

First, the alleged ill effects described by Petitioner boil down to the simple requirement that he meet his burden of proof, as established by this Court, just as he would be required to do in any case under *Taylor*'s modified categorical approach. Petitioner does not contend that this Court should reconsider the two-part framework set forth in *Taylor*, but instead complains that the application of that framework makes it difficult to establish that an individual

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[4] Although these two bills agree as to the aiding and abetting provisions, their other differing provisions have not yet been reconciled in conference committee, and it is still unclear when and if these bills will become law.

has committed an aggravated felony under the INA using the modified categorical approach.[5]

Petitioner thus maintains that there are large numbers of immigrants whom he may not remove due to the decision below. Pet. (*Duenas-Alvarez*) at 15-16. This overstates the impact of the court of appeals' decision. To be sure, the court of appeals ruled that Section 10851(a) is not categorically a "theft offense" under the INA. That ruling, however, does not prevent Petitioner from showing in any other case that an individual's violation of that statute constitutes a theft offense under the modified categorical approach set forth by this Court in *Taylor*. Petitioner has presented no valid reason why meeting his burden of proof in cases subject to the modified categorical approach under *Penuliar* would be more burdensome than a typical modified categorical case.[6]

Additionally, Petitioner dramatically overstates the scope of the decision in this case. Petitioner suggests that the *Penuliar* holding "has few obvious limits" and that the Ninth Circuit's

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[5] Petitioner also argues that this case requires review because he cannot necessarily remove immigrants whose offenses fall outside the INA's aggravated felony provisions under the INA's provision for removal of those who commit crimes involving moral turpitude. Pet. (*Duenas-Alvarez*) at 18-20. This discussion is irrelevant, because each of these provisions is designed to target specific, enumerated offenses: they are not meant to combine to include every existing offense. The fact that an offense does not fall under one provision does not automatically mean that it should be covered by the other.

[6] For example, Petitioner contends that he will have difficulty meeting his burden of proof because the language of indictments and plea colloquies often simply track the language of the statute in question. Pet. (*Duenas-Alvarez*) at 18. Again, however, there is nothing to distinguish theft offenses from any other case under the modified categorical approach approved by this Court: in each such case, the modified categorical approach is applied precisely because the statutory language is broader than the definition of "aggravated felony." Petitioner does not and cannot suggest that indictments and colloquies in non-theft offense cases are less likely to track the language of the statute at issue.

ruling "may well be extended . . . to every crime that is a basis for removal." Pet. (*Duenas-Alvarez*) at 20. But that is pure speculation. The holding in this case was that a violation of Section 10851(a) of the California Vehicle Code does not, as a categorical matter, constitute a "theft offense" for purposes of the INA. The court of appeals has not extended that holding to other contexts, there are logical reasons why the court of appeals might choose not to do so, and, indeed, the court of appeals has already demonstrated its ability and willingness to draw distinctions where appropriate.

As an example, Petitioner speculates that the court of appeals might extend its holding in this case and determine that a "crime of violence," an aggravated felony under the INA, does not include aiding and abetting offenses. Pet. (*Duenas-Alvarez*) at 20-21. The INA defines "crime of violence" by reference to the federal criminal law, specifically 18 U.S.C. § 16. This statute's language tracks the violent crime provisions discussed above, *supra* Section A, and includes "any other offense that . . . involves a substantial risk that physical force against the person or property of another may be used." 18 U.S.C. § 16. When given the opportunity to consider this distinct statutory language, the court of appeals may well conclude, as have other circuits, that aiding and abetting offenses fall within its broad sweep. *See United States v. Morrison*, 972 F.2d 269, 271 (9th Cir. 1992) (holding aiding and abetting malicious destruction a "violent felony" under the sentencing guidelines).

In short, Petitioner's speculation that the court of appeals may, in future cases, dramatically expand its holding in this case simply underscores the prematurity of certiorari.

III. THIS CASE IS AN INAPPROPRIATE VEHICLE TO RESOLVE THE QUESTION PRESENTED.

1. The question presented by Petitioner is whether a "theft offense," as defined by the INA, includes aiding and abetting. However, this case, which involves California's Unlawful

Taking of a Vehicle statute, is an inappropriate vehicle for the Court's consideration of this issue because this particular statute criminalizes not only aiding and abetting the underlying crime, but also acting as an accessory after the fact. Pet. App. 14a (explaining that Section 10851(a) "includes accessory or accomplice liability").

As shown below, California's general aiding and abetting offenses are not properly categorized as "theft offenses" under the INA. However, even if they were, Section 10851(a) of the California Vehicle Code would still not constitute, as a categorical matter, a "theft offense" because this statute also applies to "accessories" – defined by California law as traditional accessories after the fact.

Because the California Unlawful Taking of a Vehicle statute includes accessories after the fact, it criminalizes conduct even broader than traditional aiding and abetting liability. As such, a violation of Section 10851(a) of the California Vehicle Code would not be a categorical aggravated felony even if traditional aiding and abetting offenses are "theft offenses" as Petitioner contends. Accordingly, this case is an improper vehicle for resolving the question presented. Stern, *supra* § 4.4, at 231 (explaining that review may be denied where this Court "might be able to decide the case on another ground and thus not reach the point on which there is conflict") (collecting cases).

2. In his Petition, the Attorney General does not contend that the Court should actually grant plenary review in this case. Indeed, the Petition acknowledges that this case is a less-than-ideal candidate for deciding the question presented because the Petitioner contends that Mr. Penuliar failed to exhaust his claims before the BIA, and that this failure deprived the court of appeals of jurisdiction. Pet. 8-9. Mr.

Penuliar disputes that he failed to exhaust his claims.[7] Nevertheless, Petitioner is correct that the existence of a threshold jurisdictional question that may prevent this Court from reaching the merits renders this case an inappropriate candidate for review of the question presented.

3. Nor should this Court hold this case pending resolution of *Duenas-Alvarez*. As explained above, there is no conflict among the courts of appeals and it would be inappropriate to grant review to address what is, at most, an intra-circuit conflict that the court of appeals has agreed to review *en banc*, and regarding which there is pending legislation that has been passed by both houses of Congress. Additionally, *Duenas-Alvarez*, like this case, involves California's Unlawful Taking of a Vehicle statute, which broadly extends criminal liability not only to aiding and abetting but also to accessories after the fact. Pet. App. 14a.

Further, review would be inappropriate in *Duenas-Alvarez* because that case is interlocutory. This Court "generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction." *Virginia Military Inst. v. United States*, 508 U.S. 946, 946 (1993) (opinion of Scalia, J., respecting denial of petition for writ of certiorari); *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); *see also, e.g., Brotherhood of Locomotive Firemen v. Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam) ("[B]ecause the Court of Appeals remanded the case, it is not yet ripe for review by this Court"); Stern, *supra* § 4.18, at 260 ("[I]n the absence of some . . . unusual factor, the interlocutory nature of a lower court judgment will generally result in a denial of certiorari.").

Here, the court of appeals has not finally addressed whether Mr. Duenas-Alvarez was convicted of a theft offense under

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[7] Specifically, Mr. Penuliar believes that the record demonstrates that he fully exhausted his administrative remedies before the BIA. *E.g.*, Pet. App. 57a, 63a.

the INA. The immigration judge (and BIA) held that the Unlawful Taking of a Vehicle was categorically a theft offense, and so did not reach a review under the modified categorical approach. Pet. (*Duenas-Alvarez*) App. 1a-2a. Because the court of appeals concluded that the Unlawful Taking of a Vehicle under California law is not categorically a theft offense, it remanded the case for further proceedings to conduct the modified categorical review set forth in controlling precedent. *Id.* This remand renders the court of appeals' decision interlocutory.

Nor is there any reason to depart from the general rule barring review of interlocutory orders. Instead, for the myriad of reasons discussed above, *Duenas-Alvarez* is inappropriate for immediate review by this Court. Accordingly, this case should not be held for *Duenas-Alvarez*.

IV. THE PETITION SHOULD BE DENIED BECAUSE THE DECISION BELOW DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT AND IS CORRECT ON THE MERITS.

Petitioner does not contend that the decision below conflicts with any decision of this Court. To the contrary, the decision below faithfully applies this Court's controlling precedent to the specific question of whether Section 10851(a) of the California Vehicle Code categorically qualifies as a "theft offense."

A. Section 10851(a) Of The California Vehicle Code Encompasses Both California Accomplice Liability And Traditional Accessory After The Fact Liability.

California criminal law normally distinguishes between an offense committed by a principal and an offense committed by an accessory. For example, California excludes from the definition of principals those who engage in conduct that commenced after the conclusion of the crime. *See, e.g.*, Cal.

Penal Code § 31; *People v. Verlinde*, 100 Cal. App. 4th 1146, 1158 (2002).

"Accessory," in contrast, is a defined term whose meaning corresponds to the traditional offense of accessory after the fact. Cal. Penal Code § 32. California's accessory statute provides that "[e]very person who, *after a felony has been committed*, harbors, conceals or aids a principal in such felony . . . is an accessory to such felony." *Id.* (emphasis added). The offense of being an accessory under the California statute (an "Accessory") is distinct from aiding and abetting; an Accessory is not liable as a principal. *See id.*; Cal. Penal Code § 31.

Under California law, a person violates Section 10851(a) of the Vehicle Code if he "is a party or an accessory to or an accomplice in the driving or unauthorized taking or stealing [of a vehicle not his or her own.]" Cal. Veh. Code § 10851(a) (emphasis added). The statute thus allows an individual to be convicted for the offense whether the person acted as a principal, aider or abettor, or accessory after the fact. *See, e.g., United States v. Innie*, 7 F.3d 840, 852 (9th Cir. 1993). To be convicted under this statute, a person therefore need only have knowingly accepted a ride in a previously illegally acquired car. *People v. Clark*, 251 Cal. App. 2d 868, 874 (1967). The statute is thus broader than California's generic aiding and abetting law.

B. A Majority Of States Recognize That Accessories After The Fact Are Guilty Of A Separate Offense.

Under the *Taylor* categorical approach, a reviewing court compares the scope of the statute at issue to the requirements of the "generic" definition of the category of offense in the INA. The generic definition is determined by reference to state law, and should "correspond[] to the definition[] of [the category of offense] in a majority of the States' criminal codes." 495 U.S. at 589. Thus, a review of the laws of the

various states is required to determine the modern consensus, and thus the proper "generic" definition against which California Vehicle Code Section 10851(a) should be compared. There is no dispute that the court below applied the analytical approach set forth in *Taylor*. And, as shown below, the court properly concluded that Section 10851 is well outside the generic, consensus definition found in the laws of the fifty states. Pet. App. 12a-15a.

A majority of jurisdictions recognize that acting as a principal rather than as an accessory after the fact constitutes a separate offense. States address the issue of accessories after the fact in two primary ways.

First, twenty-one jurisdictions have promulgated separate criminal offenses for events related to the commission of the crime, on the one hand, and accessories after the fact, who provide assistance to the principal after the commission of the crime, on the other hand.[8] These provisions stand in contrast to Section 10851(a) of the California Vehicle Code because the California statute includes as principal offenders both principals and accessories after the fact.

Second, twenty-nine states have abandoned the "accessory after the fact" terminology and instead classify this type of offense as one of "hindering" or "obstruction of justice." 2 W. LaFave, *Substantive Criminal Law*, § 13.6 (2d ed. 2002); *see also* Model Penal Code § 242.1 Explanatory Note for

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[8] To illustrate, Florida statutes provide that "[a]ny person . . . who maintains or assists the principal or an accessory before the fact, or gives the offender any other aid . . . is an accessory after the fact." Fla. Stat. § 777.03(1)(a); *see also* 18 U.S.C. § 3; Cal. Penal Code § 32; Colo. Rev. Stat. § 18-8-105; D.C. Code § 22-1806; Fla. Stat. § 777.03; Idaho Code Ann. § 18-205; Iowa Code § 703.3; La. Rev. Stat. Ann. § 14:25; Md. Code Ann., Crim. Law § 1-301; Mass. Gen. Laws Ann. ch. 274, § 4; Miss. Code Ann. § 97-1-5; Neb. Rev. Stat. § 28-204; Nev. Rev. Stat. § 195.030; N.C. Gen. Stat. Ann. § 14-7; Okla. Stat. tit. 21, § 173; S.D. Codified Laws § 22-3-5; Tenn. Code Ann. § 39-11-411; Vt. Stat. Ann. tit. 13, § 5; Va. Code Ann. § 18.2-19; W. Va. Code § 61-11-6; Wyo. Stat. Ann. § 6-5-202.

Sections 242.1-242.8 (2001).[9] The characterization used by these states reflects the true nature of the crime: conduct that interferes with the processes of government. *Id.* Section 10851(a) of the California Vehicle Code also differs from the law in these states because it treats as principal offenders those who would instead fall under the gambit of obstruction of justice or hindering.[10]

Because under each approach the modern consensus among the states is to recognize the difference between principals and accessories after the fact, Section 10851(a) of the California Vehicle Code is broader than the modern consensus because it makes all classes of offenders guilty of the same offense.

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[9] Ala. Code §§ 13A-10-42 to -10-45; Alaska Stat. § 11.56.770; Ariz. Rev. Stat. Ann. §§ 13-2510 to -2512; Ark. Code Ann. § 5-54-105; Conn. Gen. Stat. §§ 53a-165 to -167; Del. Code. Ann. tit. 11, § 1244; Ga. Code Ann. § 16-10-50; Haw. Rev. Stat. §§ 710-1028 to -1030; 720 Ill. Comp. Stat. Ann. 5/31-4, 5/31-5; Ind. Code § 35-44-3-2; Kan. Stat. Ann. § 21-3812; Ky. Rev. Stat. Ann. §§ 520.120, 520.130; Me. Rev. Stat. Ann. tit. 17-A § 753; Minn. Stat. § 609.495; Mo. Rev. Stat. § 575.030; Mont. Code Ann. § 45-7-303; N.H. Rev. Stat. Ann. § 642:3; N.J. Stat. Ann. § 2C:29-3; N.M. Stat. § 30-22-4; N.Y. Penal Law §§ 205.50 to .65; N.D. Cent. Code § 12.1-08-03; Ohio Rev. Code Ann. § 2921.32; Or. Rev. Stat. § 162.325; 18 Pa. Cons. Stat. § 5105; R.I. Gen. Laws § 11-1-4; Tex. Penal Code Ann. § 38.05; Utah Code Ann. § 76-8-306; Wash. Rev. Code § 9A.76.050; Wis. Stat. § 946.47.

[10] Additionally, two states, Michigan and South Carolina, still follow the common law, which divides guilty parties into principals and various accessories. *See* Mich. Comp. Laws § 750.505; *People v. Cunningham*, 506 N.W.2d 624, 625 (Mich. Ct. App. 1993); S.C. Code Ann. § 17-21-60; *State v. Legette*, 330 S.E.2d 293, 294 (S.C. 1985); *see also generally* Rollins Perkins, *Parties to Crime*, 89 U. Pa. L. Rev. 581, 581 (1941); Susannah Rawl Cole, *Sewing up the Loophole in Accessory After the Fact Crimes*, 50 S.C. L. Rev. 901, 902-03 (1999). The common law also recognizes that accessories after the fact are tainted with a "'different species of guilt.'" Perkins, *supra*, at 589 (quoting 4 *Blackstone's Commentaries* *40).

C. Section 10851(a) Of The California Vehicle Code Is Also Outside The Mainstream In Its Inclusion Of California Aiding And Abetting Law.

None of the fifty states' theft offense statutes expressly includes aiders and abettors or accessories after the fact.[11] However, some states, like California, consider vehicle theft a separate offense from general theft. Of the thirty states with specific vehicle theft statutes or unauthorized use of a vehicle statutes, twenty-six have statutes which do not include aiders and abettors or accessories after the fact.[12] Section 10851(a)

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[11] Ala. Code § 13A-8-2; Alaska Stat. § 11.46.100; Ariz. Rev. Stat. Ann. § 13-1802; Ark. Code Ann. § 5-36-103; Cal. Penal Code § 484; Colo. Rev. Stat. § 18-4-401; Conn. Gen. Stat. Ann. § 53a-119; Del. Code Ann. tit. 11, § 841; Fla. Stat. § 812.014; Ga. Code Ann. § 16-8-2; Haw. Rev. Stat. § 708-830; Idaho Code Ann. § 18-2403; 720 Ill. Comp. Stat. Ann. 5/16-1; Ind. Code § 35-43-4-2; Iowa Code § 714.1; Kan. Stat. Ann. § 21-3701; Ky. Rev. Stat. Ann. § 514.030; La. Rev. Stat. Ann. § 14:67; Me. Rev. Stat. Ann. tit. 17-A, § 353; Md. Code Ann., Crim. Law § 7-104; Mass. Gen. Laws Ann. ch. 266, § 30; Mich. Comp. Laws § 750.356; Minn. Stat. § 609.52; Miss. Code Ann. § 97-17-41; Mo. Rev. Stat. § 570.030; Mont. Code Ann. § 45-6-301; Neb. Rev. Stat. § 28-511; Nev. Rev. Stat. § 205.0832; N.H. Rev. Stat. Ann. § 637:3; N.J. Stat. Ann. § 2C:20-3; N.M. Stat. § 30-16-1; N.Y. Penal Law § 155.05; N.C. Gen. Stat. § 14-72; N.D. Cent. Code § 12.1-23-02; Ohio Rev. Code Ann. § 2913.02; Okla. Stat. tit. 21, § 1701; Or. Rev. Stat. § 164.015; 18 Pa. Cons. Stat. § 3921; R.I. Gen. Laws § 11-41-1; S.C. Code Ann. § 16-13-30; S.D. Codified Laws § 22-30A-1; Tenn. Code Ann. § 39-14-103; Tex. Penal Code Ann. § 31.03; Utah Code Ann. § 76-6-404; Vt. Stat. Ann. tit. 13, § 2501; Va. Code Ann. § 18.2-95; Wash. Rev. Code § 9A.56.020; W. Va. Code § 61-3-13; Wis. Stat. § 943.20; Wyo. Stat. Ann. § 6-3-402; *see also* D.C. Code § 22-3211.

[12] Alaska Stat. § 11.46.360; Ariz. Rev. Stat. Ann. § 13-1814; Ark. Code Ann. § 5-36-108; Colo. Rev. Stat. § 18-4-409; Conn. Gen. Stat. § 53a-119b; Del. Code. Ann. tit. 11, § 853; Ind. Code § 35-43-4-2.5; Iowa Code § 714.7; Ky. Rev. Stat. Ann. § 514.100; La. Rev. Stat. Ann. § 14:68.4; Md. Code Ann., Crim. Law § 7-105; Mass. Gen. Laws Ann. ch. 266, § 28; Me. Rev. Stat. Ann. tit. 17-A, § 360; Mont. Code Ann. § 45-6-308; Nev. Rev. Stat. § 205.2715; N.J. Stat. Ann. § 2C:20-2.1; N.Y. Penal Law § 165.08; N.C. Gen. Stat. § 14-72.2; N.D. Cent. Code § 12.1-23-06; Ohio

of the California Vehicle Code is thus more broad than the scope of theft and vehicle theft statutes within the mainstream.

Petitioner suggests that regardless of the scope of state theft and vehicle theft statutes, there is a modern consensus that traditional aiders and abettors (i.e., accessories before the fact) may be convicted as principals. Pet. (*Duenas-Alvarez*) at 7-8. This argument misses the mark, however, because Congress has chosen not to apply this treatment to "aggravated felonies" under the INA. The INA contains an express provision including attempt and conspiracy to commit an aggravated felony as "aggravated felonies" themselves. 8 U.S.C. § 1101(a)(43)(U). The INA contains no such provision, however, regarding aiding and abetting. *Id.* This stands in stark contrast to the federal Sentencing Guidelines, which expressly include as "aggravated felonies" not only attempt and conspiracy, but aiding and abetting as well. U.S.S.G. §§ 2L1.2 n.5, 4B1.2 n.1. If Petitioner were correct that due to the modern treatment of accessories before the fact, aiding and abetting is necessarily included in the generic definitions of the offenses which constitute "aggravated felonies," then these provisions in the federal Sentencing Guidelines would be entirely superfluous.

Moreover, even if it were appropriate to look to the various states' definitions of "aiding and abetting" rather than their "theft" offenses, California's general aiding and abetting law is broader than that of the majority of states because it lacks an offense-specific intent requirement. Under California law, "a defendant may be held criminally responsible as an accomplice not only for the crime he or she intended to aid and abet (the target crime), but also for any other crime that is the 'natural and probable consequence' of the target crime."

Rev. Code Ann. § 2913.03; Okla. Stat. tit. 21, § 1720; 18 Pa. Cons. Stat. Ann. § 3928; S.C. Code Ann. § 16-21-60; S.D. Codified Laws § 22-30A-12; Tenn. Code Ann. § 39-14-106; Tex. Penal Code Ann. § 31.07; Wash. Rev. Code § 9A.56.070; *see also* D.C. Code § 22-3215.

People v. Prettyman, 926 P.2d 1013, 1020 (Cal. 1996); *see also Juan H. v. Allen*, 408 F.3d 1262, 1279 n.15 (9th Cir. 2005); *Windham v. Merkle*, 163 F.3d 1092, 1101 (9th Cir. 1998). Thus, under California law, individuals convicted on an aiding and abetting theory "need not have intended to encourage or facilitate the particular offense" of which they are convicted. *People v. Croy*, 710 P.2d 392, 398 n.5 (Cal. 1985). This flies in the face of generic aiding and abetting law. *See, e.g., Nye & Nissen v. United States*, 336 U.S. 613, 619 (1949). Indeed, the majority of states and the federal government have adopted the view that to be convicted under an aiding and abetting theory, an accused must intend to aid the principal in the particular offense.[13]

Both through the statute's express inclusion of traditional accessories after the fact and aiders and abettors as principals, and through the operation of California's atypically broad general aiding and abetting provisions, Section 10851(a) of the California Vehicle Code therefore encompasses conduct that falls outside the modern generic definition of theft offense. The court of appeals thus correctly concluded that the statute is not an "aggravated felony" under the INA.

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[13] At least the following jurisdictions have adopted this view: 18 U.S.C. § 2; Ala. Code § 13A-2-23; Alaska Stat. § 11.16.110; Ariz. Rev. Stat. Ann. § 13-301; Ark. Code Ann. § 5-2-403; Colo. Rev. Stat. §§ 18-1-603, 18-8-105; Del. Code Ann. tit. 11, § 271; *T.B. v. State*, 732 So. 2d 1163, 1164 (Fla. 1999); Ga. Code Ann. § 16-2-20; Haw. Rev. Stat. § 702-222; *State v. Gonzalez*, 12 P.3d 382, 384-85 (Idaho Ct. App. 2000); 720 Ill. Comp. Stat. Ann. 5/5-2; Kan. Stat. Ann. § 21-3205; Ky. Rev. Stat. Ann. § 502.020; Mo. Rev. Stat. § 562.041; N.H. Rev. Stat. Ann. § 626:8; N.J. Stat. Ann. § 2C:2-6; *State v. Carrasco*, 946 P.2d 1075, 1079 (N.M. 1997); N.D. Cent. Code § 12.1-03-01; Or. Rev. Stat. § 161.155; 18 Pa. Cons. Stat. § 306; *State v. Gazerro*, 420 A.2d 816, 828 (R.I. 1980); S.D. Codified Laws § 22-3-3; Utah Code Ann. § 76-2-202; *State v. Pitts*, 800 A.2d 481, 482-83 (Vt. 2002); Wis. Stat. § 939.05; *Jahnke v. State*, 692 P.2d 911, 921 (Wyo. 1984); *see also generally* Candace Courteau, Comment, *The Mental Element Required for Accomplice Liability: A Topic Note*, 59 La. L. Rev. 325, 333 (1998); W. LaFave, *supra*, § 13.2(c).

CONCLUSION

For these reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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REPLY BRIEF

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In the Supreme Court of the United States

ALBERTO R. GONZALES, ATTORNEY GENERAL,
PETITIONER

v.

NOPRING PAULINO PENULIAR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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In the Supreme Court of the United States

No. 05-1630

ALBERTO R. GONZALES, ATTORNEY GENERAL, PETITIONER

v.

NOPRING PAULINO PENULIAR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

Respondent does not deny that, if the Court grants certiorari in *Gonzales* v. *Duenas-Alvarez*, petition for cert. pending, No. 05-1629 (filed June 22, 2006), the petition in this case should be held pending the disposition of that case and then disposed of accordingly. Instead, respondent contends (Br. in Opp. 1-3, 8-26) that the petition in *Duenas-Alvarez* should be denied—and thus that the petition in this case should be denied as well. Respondent is mistaken.

A. The Ninth Circuit's Rule Is Incorrect

1. As the *Duenas-Alvarez* petition demonstrates (at 6-10), the Ninth Circuit erred in holding that aiding and abetting is not included in the generic definition of the term "theft offense" under the "aggravated felony" provision of the Immigration and Nationality Act (INA), 8 U.S.C. 1101(a)(43)(G). Respondent contends that that holding is correct, because

"[n]one of the fifty states' theft offense statutes expressly includes aiders and abettors or accessories after the fact." Br. in Opp. 24. That is irrelevant even if true, because every State criminalizes aiding and abetting and treats an aider and abettor as a principal, and thus the law in every State is that a defendant who aids and abets a theft offense is guilty of the theft offense itself. See *Duenas-Alvarez* Pet. 6-10.

Respondent also relies (Br. in Opp. 25) on the fact that the INA "contains an express provision including attempt and conspiracy to commit an aggravated felony as 'aggravated felonies' themselves" but "contains no such provision * * * regarding aiding and abetting." Br. in Opp. 25. That reasoning is equally flawed. As explained in the *Duenas-Alvarez* petition (at 22 n.13), attempt and conspiracy, unlike aiding and abetting, are distinct from the underlying offense, and thus would not constitute an aggravated felony unless Congress explicitly so provided. Respondent correctly points out (Br. in Opp. 25) that the Sentencing Guidelines do include aiding and abetting (as well as attempt and conspiracy) in their definition of "aggravated felony." See Sentencing Guidelines § 2L1.2, comment. (n.5). But it is hardly unusual for a legislature (or agency) explicitly to include in a statute (or regulation) a principle of law that would apply even if it were omitted, so as to remove any conceivable doubt. And even if it *were* unusual, the Sentencing Commission's inclusion of particular language in the Guidelines would not be evidence of what *Congress* intended when it enacted the INA—especially since aiding-and-abetting liability is *automatically* included as a form of principal liability under federal statute and the laws of all 50 States, whether or not it is expressly mentioned.

2. Respondent contends (Br. in Opp. 25-26) that, even if aiding and abetting is included in the generic definition of "theft offense," aiding and abetting under California law is

broader than generic aiding and abetting. That theory, however, was not the basis for respondent's argument or the Ninth Circuit's decision below. In any event, it is incorrect. According to respondent, while California holds a defendant responsible for any crime that is the "natural and probable consequence" of the crime he intended to aid and abet, "the majority of states and the federal government" do not. *Id.* at 25-26. As Professor LaFave explains, however, the "established rule" is in fact the one applied in California—that "accomplice liability extends to acts of the principal * * * which were a 'natural and probable consequence' of the criminal scheme the accomplice encouraged or aided." 2 Wayne R. LaFave, *Substantive Criminal Law* § 13.3(b), at 361 (2d ed. 2003) (footnote omitted); see *id.* § 13.3(b), at 361-362 nn. 26-29 (citing treatises, state cases, and state statutes).[1]

Respondent also contends (Br. in Opp. 20-23) that, even if aiding and abetting is included in the generic definition of "theft offense," and even if aiding and abetting under California law is no broader than generic aiding and abetting, California Vehicle Code § 10851 (West 2000) imposes liability on an "accessory," which means an accessory after the fact, and an accessory after the fact is not covered by the generic definition of "theft offense" as that term is used in the INA. As explained in the *Duenas-Alvarez* reply brief (at 2-8), that theory, too, was not the basis for the decision below; the theory

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[1] The federal courts of appeals have uniformly interpreted the federal aiding-and-abetting statute, 18 U.S.C. 2, to permit conviction on that theory. See, *e.g.*, *United States* v. *Edwards*, 303 F.3d 606, 637 (5th Cir. 2002), cert. denied, 537 U.S. 1192 and 1240 (2003); *United States* v. *Walker*, 99 F.3d 439, 443 (D.C. Cir. 1996); *United States* v. *Miller*, 22 F.3d 1075, 1078-1079 (11th Cir. 1994); *United States* v. *Moore*, 936 F.2d 1508, 1527 (7th Cir.), cert. denied, 502 U.S. 991 (1991); *United States* v. *Graewe*, 774 F.2d 106, 108 n.1 (6th Cir. 1985), cert. denied, 475 U.S. 1017 (1986); *United States* v. *Barnett*, 667 F.2d 835, 841 (9th Cir. 1982).

is not correct; even if the theory were correct, it would not follow that an alien (like respondent) who was charged with violating Section 10851(a) *as a principal* has not been convicted of a "theft offense" under the "modified categorical" approach; and the Ninth Circuit has applied the rule challenged by the government to California theft statutes that do not include the term "accessory."

B. The Ninth Circuit's Rule Conflicts With The Rule Applied By Other Courts Of Appeals

As the *Duenas-Alvarez* petition demonstrates (at 10-15), the Ninth Circuit's rule that the generic definition of "theft offense" excludes aiding and abetting is inconsistent with the principle applied by the First, Second, Seventh, and Eighth Circuits in analytically indistinguishable circumstances.[2] Respondent contends that there is no such conflict, because the statutes at issue in those cases "employ different language and serve different purposes than the INA." Br. in Opp. 11. That contention is mistaken, because the decisions from the other circuits do not rely on particular language or purposes of the statutes at issue; they rely on the basic principle of the criminal law, which the Ninth Circuit ignored, that aiding and abetting and the underlying substantive crime are not distinct offenses.[3] Respondent also contends that the decision below

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[2] Since the petition was filed, the Fifth Circuit has held that aiding and abetting bank fraud is an aggravated felony under 8 U.S.C. 1101(a)(43)(M)(i), which covers offenses that "involve[] fraud or deceit in which the loss to the victim or victims exceeds $10,000." *James* v. *Gonzales*, No. 04-60445, 2006 WL 2536614, at *2-*3 (Sept. 5, 2006).

[3] See *United States* v. *Hathaway*, 949 F.2d 609, 610-611 (2d Cir. 1991) (per curiam) ("the laws of many states today include counseling, aiding or procuring the burning within the definition of actual arson," and "[a]iding and abetting also supports a substantive conviction for arson under Federal law"), cert. denied, 502 U.S. 1119 (1992); *United States* v. *Groce*, 999 F.2d 1189, 1191 (7th Cir. 1993) ("both federal law and Wisconsin state law punish an aider and

is not inconsistent with the Eighth Circuit's decision in *United States* v. *Baca-Valenzuela*, 118 F.3d 1223 (1997), because that case "dealt with sentencing under an 'aggravated felony' provision of the federal Sentencing Guidelines," which "have been amended specifically to include aiding and abetting offenses within the definition of 'aggravated felonies.'" Br. in Opp. 12-13. That contention is likewise mistaken, because, at the time *Baca-Valenzuela* was decided, the definition of "aggravated felony" in the Guidelines was the same as that in the INA, see 118 F.3d at 1232; the fact that the Guidelines have since been amended does not mean that *Baca-Valenzuela* is no longer controlling in the Eighth Circuit on whether aiding and abetting an aggravated felony is itself an aggravated felony under the INA.

In the alternative, respondent contends (Br. in Opp. 13-14) that it would be premature for this Court to decide whether the generic definition of "theft offense" in 8 U.S.C. 1101(a)(43)(G) includes aiding and abetting, because the Ninth Circuit recently granted rehearing en banc in *United States* v. *Vidal*, 426 F.3d 1011 (2005), rehearing granted, 453 F.3d 1114 (2006). As explained in the *Duenas-Alvarez* reply brief (at 8-10), that contention is mistaken, because *Vidal* does not involve the question presented in this case.[4] Contrary to re-

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abettor as a principal"); *United States* v. *Mitchell*, 23 F.3d 1, 2 (1st Cir. 1994) (per curiam) ("aiding and abetting is not a separate offense from the underlying substantive crime") (internal quotation marks and citation omitted); *United States* v. *Baca-Valenzuela*, 118 F.3d 1223, 1232 (8th Cir. 1997) ("Whether one is convicted *as* a principal or *as* an accomplice/aider and abettor, the crime *of which* he is guilty is the same: whatever is the underlying offense."); *James*, 2006 WL 2536614, at *3 ("Significantly, the aiding and abetting statute, 18 U.S.C. § 2, does not define a separate crime, but rather provides another means of convicting someone of the underlying offense.") (internal quotation marks and footnote omitted).

[4] While the en banc petition in *Vidal* did argue that "the panel's decision conflicted with the Ninth Circuit's decision in *Penuliar*" (Br. in Opp. 14), it did

spondent's contention, the government is not seeking to "have it both ways" in arguing (1) that the decision below conflicts with *Baca-Valenzuela* and (2) that the grant of en banc review in *Vidal* does not render certiorari review in *Duenas-Alvarez* premature. Br. in Opp. 14 n.3. The decision below conflicts with *Baca-Valenzuela* because that case interpreted a prior definition of "aggravated felony" that did not explicitly include aiding and abetting; it does not conflict with *Vidal* because that case interpreted a current definition of "aggravated felony" that *does* explicitly include aiding and abetting.

C. If Left Unreviewed, The Ninth Circuit's Rule Will Have A Substantial Effect On The Administration Of The Immigration Laws

The *Duenas-Alvarez* petition points out (at 15-16) that there are approximately 8000 cases that could be affected by the Ninth Circuit's rule. Respondent contends that "[t]his overstates the impact of the court of appeals' decision," because the decision "does not prevent [the government] from showing * * * that an individual's violation of [Section 10851(a)] constitutes a theft offense under the modified categorical approach." Br. in Opp. 16. In fact, the decision does

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not argue that the decision conflicted with *Penuliar* on the question presented here. Instead, in the portion of the en banc petition cited by respondent, Vidal argued that the documents in the record were insufficient to show that he had been convicted of a "theft offense" under the "modified categorical" approach, because the charging instrument merely tracked the language of California Vehicle Code § 10851(a). See 04-50185 Pet. for Reh'g & Suggestion for Reh'g En Banc at 4-5, 16-17. There is in fact no conflict between *Vidal* and *Penuliar* on that point. The Ninth Circuit did not hold in *Penuliar* that a charging instrument is insufficient if it tracks the statutory language; it held that it is insufficient if the generic definition of an offense excludes aiding and abetting (because a defendant charged as a principal can be convicted as an aider and abettor). See Pet. App. 15a-17a. The generic definition at issue in *Vidal* explicitly includes aiding and abetting.

precisely that as a practical matter in a great number of cases. As explained in the *Duenas-Alvarez* petition (at 17-18), under the Ninth Circuit's "modified categorical" holding (see Pet. App. 15a-17a), even an alien explicitly charged as a principal will not be deemed to have been convicted of a "theft offense" on the basis of the charging instrument and corresponding judgment (because a defendant charged as a principal can be convicted as an aider and abettor), and other documents from the criminal case often will be unavailable or difficult to obtain, or will shed no light on whether the alien was convicted as what the Ninth Circuit regards as a "true principal."

The *Duenas-Alvarez* petition also explains (at 20-21) that the Ninth Circuit's rule has few obvious limits and may well be extended to other crimes that are a basis for removal under the INA. Respondent disagrees. According to him, the holding of the Ninth Circuit is merely that "a violation of Section 10851(a) of the California Vehicle Code does not * * * constitute a 'theft offense' for purposes of the INA"; the Ninth Circuit "has not extended that holding to other contexts"; and "there are logical reasons why [it] might choose not to do so." Br. in Opp. 17. In fact, the Ninth Circuit's holding that the generic definition of "theft offense" excludes aiding and abetting has already been applied to other theft crimes, see *United States* v. *Corona-Sanchez*, 291 F.3d 1201, 1207-1208 (9th Cir. 2002) (en banc) (general theft under California Penal Code § 484(a) (West 1999)); *Martinez-Perez* v. *Gonzales*, 417 F.3d 1022, 1027-1028 (9th Cir. 2005) (grand theft under California Penal Code § 487(c) (West 1999)), and the brief in opposition does not identify any "logical reasons" for not extending it to crimes such as murder, rape, and bur-

glary, see 8 U.S.C. 1101(a)(43)(A) and (G); *Duenas-Alvarez* Pet. 20-21.[5]

D. *Duenas-Alvarez* Is A Suitable Vehicle For Deciding Whether The Ninth Circuit's Rule Is Incorrect

1. Respondent contends (Br. in Opp. 17-18) that *Duenas-Alvarez* is an unsuitable vehicle for deciding the question presented, because, unlike most California theft statutes, California Vehicle Code § 10851(a) includes the term "accessory," and thus is broader than the generic definition of "theft offense" without regard to whether that generic definition includes aiding and abetting. Even if the statute's inclusion of "accessory" means that Section 10851(a) is not categorically a "theft offense," *Duenas-Alvarez* is still a suitable vehicle for deciding whether the generic definition includes aiding and abetting. As explained in the *Duenas-Alvarez* reply brief (at 5-8), whatever the significance of the term "accessory" in the statute, an alien charged with violating Section 10851(a) as a principal has been convicted of a "theft offense" under the "modified categorical" approach if "theft offense" includes aiding and abetting—and, in any event, the Ninth Circuit has already applied the rule challenged here to statutes that do not include the term "accessory."

2. Respondent contends (Br. in Opp. 19-20) that *Duenas-Alvarez* is an unsuitable vehicle for the additional reason that the Ninth Circuit remanded the case to the Board of Immigration Appeals, and thus, according to respondent, the case

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[5] Respondent also contends that "[t]here is no pressing need to resolve the issue presented" because "both houses of Congress have addressed [it] through pending legislation." Br. in Opp. 14-15. As of the date of the filing of this reply brief, however, a conference committee has not even been appointed to reconcile the two major immigration-reform bills, which differ in significant respects. As respondent acknowledges, therefore, "it is still unclear when and if these bills will become law." *Id.* at 15 n.4. For that reason, the pendency of the bills provides no basis for denying certiorari.

is in an interlocutory posture. That contention fails for a number of reasons.

In the first place, this case is not in an interlocutory posture in the sense in which that term is ordinarily understood when the decision is by a federal court of appeals, because the case has not been remanded to a federal district court, such that it remains within the Judicial Branch. A decision of a federal court that reverses an agency decision and remands the matter to the agency is *final* for purposes of further judicial review. Cf. *Sullivan* v. *Finkelstein*, 496 U.S. 617 (1990) (order of district court effectively declaring regulations invalid and remanding case to agency is "final decision" under 28 U.S.C. 1291).

Moreover, assuming that the case was remanded "to conduct [a] modified categorical review" (Br. in Opp. 20)—the court of appeals' brief memorandum opinion does not say what the purpose of the remand is—that would not be a basis for denying review on "interlocutory" grounds in *Duenas-Alvarez* even if there could be a case in which a court's remand to an agency renders the case nonfinal. Respondent was charged as a principal, see Pet. App. 16a n.8; the Ninth Circuit held that that is not a sufficient basis for a finding that he was *convicted* as a principal (because a defendant charged as a principal can be convicted as an aider and abettor), *id.* at 15a-17a; and Duenas-Alvarez was likewise charged as a principal, in language essentially identical to that in the charging instruments in this case, see *Duenas-Alvarez* Pet. App. 13a (No. 05-1629). The Ninth Circuit's "modified categorical" holding in this case and the administrative record in *Duenas-Alvarez* thus combine to make it virtually inevitable that the agency would find that Duenas-Alvarez was not convicted of a "theft offense," and the government would not be able to seek judicial review of that decision. Under these circumstances, the court of appeals' decision in *Duenas-Alvarez* is

final (rather than interlocutory) both because the "outcome of [the] further proceedings [is] preordained" and because "the governing * * * law would not permit [the government] again to present [its] * * * claim[] for review" if the agency ruled in favor of Duenas-Alvarez. *Cox Broad. Corp.* v. *Cohn*, 420 U.S. 469, 479, 481 (1975).

Even if the decision could be viewed as interlocutory, however, "there is no absolute bar to review of nonfinal judgments of the lower federal courts," *Mazurek* v. *Armstrong*, 520 U.S. 968, 975 (1997) (per curiam), and the considerations identified above would justify the exercise of this Court's certiorari jurisdiction. The exercise of that jurisdiction in *Duenas-Alvarez* is particularly warranted inasmuch as the Ninth Circuit's rule that "theft offense" excludes aiding and abetting is "clearly erroneous," *ibid.*; the rule conflicts with the rule applied in other circuits; a large number of immigration cases are affected by the rule, see *Duenas-Alvarez* Pet. 15-21; there is a substantial threshold jurisdictional question in this case and most of the other cases in which the Ninth Circuit has applied the rule, see *id.* at 23-24; and there is likely to come a point in the near future at which the question presented no longer reaches that court, inasmuch as the Board of Immigration Appeals is bound by the Ninth Circuit's decisions in cases arising there, see, *e.g.*, *In re Anselmo*, 20 I. & N. Dec. 25, 31-32 (B.I.A. 1989).

* * * * *

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition for a writ of certiorari should be held pending this Court's disposition of *Gonzales* v. *Duenas-Alvarez*, No. 05-1629, and then disposed of accordingly.

Respectfully submitted.

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